plaintiff's property "until 1979 when the said construction work was concluded.". However in prayer (a) the plaintiff claimed for damages, for inconvenience and mental anguish. But nowhere in the statement of claim did the plaintiff make any mention of nuisance or any injury to the plaintiff. The plaintiff's claim only speaks of damages to her property when the construction work was being carried out by the defendant.

It is clear to me that the plaintiff did not plead nuisance. I agree with the finding of the learned Sessions Court Judge on this point. I agree that the plaintiff's cause of action is statute-barred.

There is another issue, namely, *locus standi*. This was not pleaded by the defendant. However, in his affidavit in support of the notice of application, the defendant averred that the plaintiff had no *locus standi* because as on the day the action was commenced, the plaintiff was not the registered owner of the land known as No. 124 Malacca Street, Penang. The notes of evidence before the learned Sessions Court Judge shows that this point was taken up by the learned Counsel for the defendant. However, the learned Sessions Court Judge did not touch on it in her grounds of judgment. As a result even Mr. Karpal Singh did not include that point as one of his grounds in the memorandum of appeal.

In the circumstances, and in view of my finding on grounds discussed earlier, I do not think that it is necessary to decide on that issue.

Lastly, in his letter to me delivered one day after the appeal was heard, and one day before I delivered my decision, learned Counsel for the appellant raised another point, that is, delay on the part of the defendant in making the application in question.

This point was never raised at any time earlier. In fairness to the defendant I do not think I should entertain it.

PETMAL OIL (MALAYSIA) SDN. BHD.

v.

CHE MARIAH BTE MOHD TAHIR (TRADING AS DELTA MEC ENTERPRISE)

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[CIVIL SUIT NO. D2-22-702-92]
24 MAY 1993

PRACTICE & PROCEDURE: Application to set aside ex parte interim injunction - Defendant contending non-disclosure of material facts - Whether justified - Whether damages in order.

LAND LAW: Application for vacant possession - Defendant 3/5 owner of two sub-divided lots - Defendant occupying petrol station and office on one lot pursuant to dealership agreement - Defendant authorised dealer of plaintiff's petroleum products - Defendant breaching terms of agreement - Plaintiff sending notice to vacate - Defendant's licence to operate petrol station cancelled by authorities - Defendant refusing to deliver vacant possesssion and continuing to operate petrol station - Plaintiff obtaining ex parte interim injunction to oust defendant and agents from petrol station - Whether defendant had right to remain on lot - Whether defendant had right to operate petrol station - Plaintiff alleging oral agreement for cross transfer of shares between parties - Denial by defendant - Whether plaintiff able to prove.

TRUST: Executive chairman of plaintiff claiming to hold 2/5 share of two sub-divided lots as trustee for plaintiff - Lots Malay reservation - Whether any evidence of creation of trust - Whether contrary to law - Sections 2 & 14 of the Malay Reservations Enactment 1938.

WORDS & PHRASES: Malay Reservatons Enactment 1938 - "Malay".

The defendant and the executive chairman of the plaintiff were the registered owners of two sub-divided lots known as HS(M) 5339 PT 8540 and 8541 holding 3/5 share and 2/5 share in both lots respectively. The plaintiff constructed a petrol station on lot 8541 and pursuant to a dealership agreement dated 23 August 1988 the defendant operated the petrol station and sold exclusively petroleum products distributed by the plaintiff until March 1992 when the plaintiff discovered the defendant was selling products distributed by other petroleum companies

contrary to the agreement. Upon the defendant's failure to attend two meetings to discuss the matter the plaintiff sent a notice to the defendant to vacate. Following this the defendant's licence to operate the petrol station was cancelled by the Ministry of Domestic Trade and Consumer Affairs. Notwithstanding, the defendant continued to operate the station and refused to deliver vacant possession. The plaintiff obtained an *ex parte* interim injunction to oust the defendant, her agents and servants from the petrol station alleging breach of the agreement and also the existence of an oral agreement between the parties for a cross transfer of their respective shares to enable the plaintiff and defendant to enjoy absolute ownership in lots 8450 and 8451 respectively.

The main issues before the Court were whether there had been non-disclosure of facts by the plaintiff and the right of the defendant to remain on lot 8541 as opposed to her right to operate the petrol station.

Held:

[1] At the *ex parte* hearing, the executive chairman of the plaintiff maintained that he held the 2/5 share of the 8541 lot as trustee for the plaintiff which was untrue as there was no evidence to establish the creation of a trust, express or implied, in favour of the plaintiff. It was contrary to law as the 8541 lot was a Malay reservation and s. 14 of the Malay Reservations Enactment 1938 restricts the creation of trust of such land to persons who are not Malays. A Malay has been defined by s. 2 of the Enactment to mean a person belonging to any Malayan race who habitually speaks the Malay language or any Malayan language and professes the Moslem religion. This definition ruled out the plaintiff completely as under s. 14 any trust or alleged trust, whether express, implied or constructive, created in favour of any person who is not a Malay shall be null and void. In the affidavit supporting the *ex parte* application the plaintiff had not disclosed the lot was a Malay reservation nor was the title exhibited as evidence of the same. The Court considered this to be a material non-disclosure for had that evidence been available at the *ex parte* hearing the Court would not have granted the interim injunction in view of s. 14.

[2] The reason given by the plaintiff for seeking vacant possession of the petrol station was the alleged breach by the defendant of the agreement. In this respect, the plaintiff's conduct was also not above board as under the agreement the plaintiff was to supply all their petroleum products to the defendant as and when the latter placed orders. There was evidence that between May 1989 to March 1991 the plaintiff had not met the orders of the defendant or delayed the supply and delivery forcing the defendant to close the petrol station on a number of occasions. This was not disclosed at the *ex parte* hearing which the Court considered to be a material non-disclosure as the plaintiff's conduct was equally relevant when the issue of fault was being determined. As for the cancellation of the defendant's licence to operate the petrol station, there was evidence to show that the action taken by the authorities was initiated by the plaintiff. Thus it became very material for the plaintiff to exhibit their letter addressed to the Ministry.

[3] The defendant's right to remain on the land was derived from her ownership of the land which although not absolute was nonetheless limited to her 3/5 share which the plaintiff could not deny. Her right to operate the business of the petrol station stemmed from her contractual rights under the agreement which the plaintiff contended had already expired but which was denied by the defendant. From the evidence it was clear that there were many serious questions in issue raised by both sides.

[4] As proof of the cross transfer, the plaintiff relied on a statutory declaration affirmed by the defendant and a blank memorandum of transfer also executed by the defendant. The statutory declaration however did not mention any cross transfer and neither did it mention the fact that the executive chairman held 2/5 share of the 8541 lot as trustee for the plaintiff. As for the memorandum of transfer the plaintiff had failed to exhibit it although it was admitted to be in their possession. As the cross transfer was denied by the defendant it was incumbent upon the plaintiff to produce evidence of the alleged oral agreement which was not forthcoming.

[5] The interim injunction obtained by the plaintiff was a mandatory injunction and since the defendant had been in occupation of the petrol station for a period of over 2 $^{1}/_{2}$ years, ousting her from the petrol station had caused her irreparable damage in that she was denied

her livelihood. In the circumstances the Court allowed the defendant's application with costs to be taxed and damages to be assessed.

[Application allowed with costs to be taxed and damages to be assessed].

Legislation referred to:
Malay Reservations Enactment 1938, ss. 2, 14

For the plaintiff/respondent - Amir Ismail; M/s. Thakurta, Low & Amir Ismail
For the defendant/applicant - N. Balan; M/s. Shook Lim & Bok

JUDGMENT

Siti Norma Bte Yaakob J:
The plaintiff's cause of action in these proceedings is for vacant possession of a petrol station and office which had been occupied by the defendant pursuant to a dealership agreement dated 23 August 1988. Under the agreement, the plaintiff appointed the defendant to be their authorised dealer to sell their petroleum products under the original trade name of FINA and later PETMAL at the petrol station situated on land held under title H.S.(M) 5340, P.T. 8541, Mukim of Batu, District of Wilayah Persekutuan, Kuala Lumpur (the 8541 lot).

On 20 May 1992, the plaintiff obtained an *ex parte* injunction restraining the defendant, her agents or servants from using or occupying the petrol station and office. In applying to set aside this interim injunction, the defendant relied heavily on the issue of non-disclosure but before I go into the merits of that issue, I need to state the relevant background facts so that the dispute between the parties can be viewed with the proper perspective.

The 8541 lot was part of an undivided piece of land held under title H.S.(M) 2363, P.T. 35464, Mukim of Batu, District of Wilayah Persekutuan, Kuala Lumpur (the undivided land). The undivided land was originally registered in the name of the defendant's brother, one Mustaman bin Tahir. In 1983 and 1984, Mustaman charged the undivided land to Perwira Habib Bank and following an order made by the Pentadbir Tanah Daerah Wilayah Persekutuan, Kuala Lumpur, on 13 April 1987, the undivided land was publicly auctioned on 17 December 1987. The successful bidder at the public auction was the defendant, who purchased the undivided land for RM241,500. She paid RM24,150 being the 10% deposit of the purchase price but the balance of RM217,350 was settled by the plaintiff.

Prior to the public auction, Mustaman had applied to the Director of Lands and Mines, Federal Territory, to have the undivided land sub-divided and also to change the category of use of the undivided land from agriculture to building. This application was approved by the authorities on 9 June 1988, and the undivided land was sub-divided into the following lots:

(1) H. S. (M) 5339, P.T. 8540, Mukim of Batu, District of Wilayah Persekutuan, covering an area of 21,485 square feet and subject to the condition that the land is to be used for the building of a dwelling house.

(2) The 8541 lot covering an area of 15,091 square feet and subject to the condition that it shall be used for a commercial building (a petrol pump).

Both sub-divided lots were registered in the joint names of the defendant and one Long Mohd. Noor Affendi bin Long Ibrahim (Long Affendi), the executive chairman of the plaintiff, with the defendant holding 3/5 ownership and Long Affendi 2/5 in both sub-divided lots.

Under preamble 4 of the agreement, the plaintiff undertook to construct a petrol filling and service station on the 8541 lot at their own expenses. This was duly done and the defendant went into occupation of the petrol station and started operating it on 15 February 1989, under the trade name of Delta Mec Enterprise. She, however, never paid any rental to the plaintiff but only the dealer fee and additional charges agreed to under clauses 3(a) and (b) of the agreement.

Under clauses 2, 4(b) and 6(a), the defendant was to sell exclusively the petroleum products distributed by the plaintiff for a period of one year with the right of option given to the plaintiff to renew the agreement for another term of one year.

For the first year of business, the plaintiff were fully satisfied with the defendant's management and operations so much so that before the expiry of the agreement, the plaintiff by letter dated 19 February 1990, extended the agreement for a period of not one year but two years commencing from 23 August 1989, to 23 August 1991. Even after 23 August 1991, without any formal extension to the agreement, the plaintiff

allowed the defendant to continue operating the petrol station to the mutual benefit of both of them.

Trouble started in March 1992, when the plaintiff discovered that the defendant was also selling petroleum products distributed by other petroleum companies, which is contrary to what had been agreed to under the agreement. Two meetings were set up by the plaintiff to take place on 4 March 1992, and 24 March 1992, for the purpose of discussing matters relating to the petrol station but the defendant failed to attend the 2 meetings.

The upshot of this was that on 24 March 1992, the plaintiff sent a notice to the defendant listing 7 breaches of the agreement on the part of the defendant and in the same notice, the plaintiff indicated that they had no intention of extending the agreement and to that end gave her 30 days notice to vacate the petrol station and surrender it to them after the expiry of the 30 days.

Following this notice, the defendant's licence to operate the petrol station was cancelled by the Ministry of Domestic Trade and Consumer Affairs on 23 April 1992. Despite the notice and the cancellation of the licence, the defendant refused to deliver vacant possession of the petrol station to the plaintiff but instead continued operating the petrol station.

It was under these circumstances that the plaintiff obtained the *ex parte* interim injunction on 20 May 1992, ousting the defendant, her agents and servants from the petrol station.

At the *ex parte* hearing, Long Affendi maintains that he holds the 2/5 share of the 8541 lot as trustee for the plaintiff and that the true beneficiaries are the plaintiff. The defendant questions this statement as being not only untrue but also contrary to law. It is untrue as there is no evidence to establish the creation of a trust, express or implied, in favour of the plaintiff. It is contrary to law as the 8541 lot is a Malay Reservation and s. 14 of the Malay Reservations Enactment 1938 restricts the creation of trust of such land to persons who are not Malays. A Malay has been defined by s. 2 of the Enactment to mean a person belonging to any Malayan race who habitually speaks the Malay language or any Malayan language and professes the Moslem religion. This definition rules out the plaintiff completely and under s. 14 any trust, or alleged trust, whether such trust is express, implied or constructive, created in favour of any person who is not a Malay shall be null and void.

In the affidavit supporting the *ex parte* application the plaintiff have not disclosed the fact that the 8541 lot is a Malay Reservation and neither has the title been exhibited as evidence of that fact. I consider that this non-disclosure to be a material non-disclosure for had that evidence been available at the *ex parte* hearing, I would not have granted the interim injunction in the first place in view of s. 14.

The reason given by the plaintiff why they wanted vacant possession of the petrol station was that the defendant had breached the agreement by selling petroleum products distributed by other petroleum companies. In this respect, the plaintiff's conduct is also not above board as under the agreement, the plaintiff were to supply all their petroleum products to the defendant as and when the latter placed orders for such goods. There is evidence that between May 1989 to March 1991, the plaintiff had not been meeting the orders of the defendant to supply their products for sale or if such orders were met, there was a delay in the supply and delivery of the products as a result of which the defendant was forced to close the petrol station on a number of occasions.

This fact was never disclosed by the plaintiff at the *ex parte* hearing and I consider this to be a material non-disclosure as the plaintiff's conduct is equally relevant when the issue of fault is being determined.

The plaintiff have also alleged that there was an oral agreement reached between the defendant that there would be a cross transfer of their respective shares of the 2 sub-divided lots in that the defendant would surrender her 3/5 share in the 8541 lot to enable the plaintiff to enjoy the absolute ownership of the whole of the 8541 lot whilst Long Affendi would transfer his 2/5 share in the other sub-divided lot so that the defendant would become the absolute owner of the sub-divided 8540 lot.

As proof of this cross transfer, the plaintiff relied on a statutory declaration affirmed by the defendant on 15 July 1988, and a blank memorandum of transfer also executed by the defendant. The statutory declaration, however, does not mention any cross transfer and neither does it mention the fact that Long Affendi holds the

2/5 share of the 8541 lot as trustee for the plaintiff. As for the memorandum of transfer, the plaintiff have failed to exhibit it although they have admitted in their letter dated 7 July 1988, which is exhibited to their affidavit in support of their *ex parte* application, that the memorandum of transfer was in their possession. As the cross transfer is denied by the defendant, it is incumbent upon the plaintiff to produce evidence of the alleged oral agreement relating to the alleged cross transfer. This evidence is not forthcoming not only at the time of applying for the injunction but even after the plaintiff were challenged by the defendant to produce it. In any event, the issue of the cross transfer is the subject matter of a separate suit filed by the plaintiff and Long Affendi against the defendant.

To rebut the non-disclosure issue, the plaintiff contend that since the agreement has expired and that the defendant's licence to operate the petrol station has been cancelled, it serves no purpose to have the defendant at the petrol station.

What is in issue here is the right of the defendant to remain on the 8541 lot as opposed to her right to operate the business of the petrol station.

Her right to remain on the land is derived from her ownership of the land, which although not absolute is nonetheless limited to her 3/5 share. The plaintiff cannot possibly deny this fact.

Her right to operate the business of the petrol station stems from her contractual rights under the agreement, which the plaintiff contend have already expired but is denied by the defendant. She contends that the plaintiff had no right to terminate the agreement as there was a tacit arrangement between them that she would be allowed to deal with the plaintiff's products for 30 years. This is disputed by the plaintiff and from the affidavit evidence it is clear that there are many serious questions in issue raised by both sides.

As for the cancellation of the defendant's licence to operate the petrol station, there is evidence to show that the action taken by the authorities to cancel the licence was initiated by the plaintiff. In this respect, the plaintiff had written to the Ministry no doubt complaining against her and since the defendant has alleged that the plaintiff had been very high handed in this matter, it becomes very material for the plaintiff to exhibit their letter addressed to the Ministry which resulted in the licence being cancelled.

The interim injunction obtained by the plaintiff was a mandatory injunction and since the defendant had been in occupation of the petrol station for a period of over 2 $^{1}/_{2}$ years, needless to say that ousting her from the petrol station has caused her irreparable damage in that she has been denied her livelihood. In the light of the circumstances prevailing in this suit, particularly where there has been material non-disclosure at the *ex parte* hearing, I had accordingly allowed the defendant's application with costs by setting aside the interim injunction dated 20 May 1992, and ordering that the plaintiff pay the defendant's taxed costs and assessed damages forthwith.